

2574
No. 12197

United States
Court of Appeals
for the Ninth Circuit

LOUISE HAMILTON,

Appellant,

VS.

NATIONAL LABOR RELATIONS BOARD,

Appellee.


Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Northern Division

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Northern District of California, Northern Division

No. 6025

NATIONAL LABOR RELATIONS BOARD,

Applicant,

vs.

LOUISE HAMILTON,

Respondent.

APPLICATION FOR ORDER REQUIRING
OBEDIENCE TO SUBPENA DUCES
TECUM

The National Labor Relations Board, hereinafter referred to as the Board, by its General Counsel, acting through Louis S. Penfield, Chief Law Officer in the Board's Twentieth Region, San Francisco, California, respectfully applies to this Honorable Court, pursuant to Section 11 (2) of the National Labor Relations Act, as amended (Public Law 101—80th Congress, 1st Session, 29 U.S.C.A. § 141, et seq.) (Supp. 1947), hereinafter referred to as the Act, for an order requiring Louise Hamilton, 1527 North "C" Street, Sacramento, California, to obey a subpoena duly served upon her, as set forth herein. In support of said application the Board, upon information and belief, respectfully shows to this Court as follows:

1. This Court has jurisdiction of the matter herein by virtue of Section 11 (2) of the Act, as hereinafter more fully set forth.

2. The Board is an agency of the United States, created pursuant to Section 3 (a) of the Act. A copy of the Act, together with the Board's Rules and Regulations, Series 5, and Statements of Procedure, is attached hereto, marked Exhibit No. 1, parts (a) and (b), respectively, and made a part hereof.

3. Respondent Louise Hamilton is an individual employed as bookkeeper by A. Levy and J. Zentner Co., a California corporation, having a place of business at 1527 N. "C" St., Sacramento, California. The said A. Levy and J. Zentner Co., was, before December 31, 1946, one of several co-partners doing business at Sacramento, California, in the name and style of Rainier Distributing Co. Thereafter, the said A. Levy and J. Zentner Co., did business at the same place in the name and style of Valley Beverage Company and Bell Distributing Company.

4. The Board is empowered by virtue of Section 10 of the Act to prevent any person from engaging in any unfair labor practices within the meaning of Section 8 of the Act which affect or tend to affect commerce within the meaning of Section 2 (6) and (7) of the Act.

5. Upon charges filed pursuant to Section 10 (b) of the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, through the Regional Director of the Twentieth Region of the Board in San Francisco, on April 26, 1948, pursuant to Section 10 (b) of the Act, duly issued a complaint alleging, inter alia, that A. Levy and J. Zentner Co., doing business in the

name and style of Valley Beverage Company, as successor to Rainier Distributing Co., had engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a), subsections (1) and (3), and Section 2 (6) and (7) of the Act. The proceeding in which said complaint was issued bears the Board docket numbers "Case No. 20-C-1570, Case No. 20-C-1571, and Case No. 20-C-1572" and the full title thereof appears in the caption of said complaint, a copy of which is annexed hereto, made a part hereof, and marked Exhibit 2. Said complaint was duly served upon A. Levy and J. Zentner Co., and the said company thereafter filed its answer thereto, in substance denying that it engaged in or is engaging in the unfair labor practices alleged. Pursuant to notice, a hearing on said complaint was begun on June 14, 1948, at Sacramento, California, before a trial examiner of the National Labor Relations Board. On June 23, 1948, the hearing was continued sine die, subject to re-opening upon ten days' notice to the parties.

6. Section 11 (1) of the Act provides that for the purpose of all hearings and investigations which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by Sections 9 and 10 of the Act, the Board, or any member thereof, shall, upon application of any party to the proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Section 11 (1) of the Act further provides that within five days after the service of

a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required.

7. By virtue of Section 203.35 of the Board's Rules and Regulations, issued pursuant to Section 6 of the Act and Section 7 (b) of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C.A. § 1001, et seq. (Supp. 1946)) the trial examiner is authorized, with respect to cases assigned to him, subject to the Rules and Regulations of the Board and within its power, to grant applications for subpoenas and to rule upon petitions to revoke subpoenas. By virtue of Section 203.31 of the Board's Rules and Regulations, the trial examiner is empowered to revoke the subpoena if in his opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity to evidence whose production is required.

8. Section 11 (2) of the Act provides that in the case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person is guilty of contumacy or refusal

to obey is found or resides or transacts business, upon application by the Board, shall have jurisdiction to issue an order requiring such person to appear before the Board, its member, agent, or agency, and to produce evidence if so ordered or to give testimony touching the matter under investigation or in question.

9. At various times between June 14 and June 22, 1948, counsel for the General Counsel of the Board requested A. Levy and J. Zentner Co. to produce by stipulation or competent witnesses evidence respecting the purchases of merchandise in and out of the State of California by the said company while doing business in the name and style of Valley Beverage Company or Bell Distributing Company and concerning its business structure, manner of operation and personnel from January 1, 1947, to the present time. A. Levy and J. Zentner Co. refused fully to comply with such requests.

10. On June 23, 1948, a subpoena duces tecum duly issued, pursuant to Section 11 (1) of the Act, by John M. Houston, a member of the Board, and directed to respondent Louise Hamilton, to appear before a trial examiner of the Board on the 28th day of June, 1948, or sooner, at 10:00 a.m., and then and there to produce various documentary data as therein described, and to testify, was duly served upon respondent Louise Hamilton. A copy of the said subpoena duces tecum, with affidavit of service, is hereto annexed, marked Exhibit 3, and made a part hereof. On June 23, 1948, respondent Louise Hamilton appeared at the hearing before the

trial examiner of the Board and filed her Special Appearance By Motion to Quash Subpena and Petition to Revoke Subpena, a copy of which is hereto annexed, marked Exhibit 4, and made a part hereof. The trial examiner denied the said motion to quash Subpena and Petition to Revoke subpena.

11. Respondent Louise Hamilton, upon advice of her counsel, then failed and refused and is continuing to fail and refuse to testify or to produce the books, records, and documents as called for in the subpena duces tecum.

12. The books, records and documents called for in the subpena duces tecum are relevant, material and necessary in the aforementioned proceeding before the Board and relate to the matters under investigation and in question before the Board, in that the same bear upon whether or not the operations of A. Levy and J. Zentner Co., doing business as Valley Beverage Company or Bell Distributing Company affect commerce and whether or not A. Levy and J. Zentner Co., doing business as Valley Beverage Company or Bell Distributing Company is a successor to the co-partnership which formerly did business as Rainier Distributing Company. It is desired by the Board's agents to question respondent Louise Hamilton, as bookkeeper for A. Levy and J. Zentner Co., concerning the identity and subject matter of the documents required to be produced by the subpena duces tecum concerning the business operations, structure and personnel of A. Levy and J. Zentner Co., and concerning the effect of such operations on commerce within the meaning of Sections 2 (6) and (7) of the Act.

13. Counsel for both A. Levy and J. Zentner Co., and respondent Louise Hamilton agree and acknowledge that respondent Louise Hamilton is a competent witness who has the ability to produce the evidence described in the subpoena duces tecum.

14. The refusal of said respondent Louise Hamilton to obey the subpoena duces tecum has impeded and continues to impede the Board in the investigation of the aforesaid matters and in the conduct of the hearing upon the aforesaid complaint and in the performance of its duties under the Act.

Wherefore, the applicant, the National Labor Relations Board, respectfully prays:

(a) that an Order to Show Cause be issued forthwith directing the respondent, Louise Hamilton, to appear before this Court on a day certain to be fixed in the Order, and show cause, if there be any, why an order of this Court should not issue directing Louise Hamilton to appear before the Board's Trial Examiner, at such time and place as this Court may order and there produce the books, records, and documents described in the aforementioned subpoena duces tecum and to testify as described in the aforesaid subpoena duces tecum.

(b) that upon the return of said Order to Show Cause, an order issue requiring respondent Louise Hamilton to appear before the Trial Examiner of the National Labor Relations Board at such time and place as the Court may order and there to produce the books, records and documents described in the aforementioned subpoena duces tecum and to

testify and give evidence as required by the subpoena duces tecum.

(c) that the applicant, National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

Dated at San Francisco, Calif., this 29th day of July, 1948.

NATIONAL LABOR RELATIONS
BOARD.

By /s/ LOUIS S. PENFIELD,
Chief Law Officer, Twentieth Region, San Francisco,
California.

State of California,
City and County of San Francisco—ss.

I, Louis S. Penfield, being first duly sworn, depose and say that I am Chief Law Officer for the Twentieth Region, National Labor Relations Board, that I have read the foregoing petition and know the contents thereof, and that the statements therein upon personal knowledge are true and those upon information and belief, I believe to be true.

/s/ LOUIS S. PENFIELD,
Chief Law Officer, 20th Region, National Labor Relations Board, San Francisco, California.

Subscribed and sworn to before me this 29th day of July, 1948.

[Seal] /s/ HENRY B. LISTER,
Notary Public.

EXHIBIT No. 4

United States of America Before the National Labor
Relations Board, Twentieth Region

Case No. 20-C-1572, 20-C-1571, 20-C-1570

In the Matter of ALFRED A. BAROSSO, AN-
DREW W. WILLI, JOSEPH W. BOWMAN,
WILLIAM A. HARTFORD, and A. LEVY and
J. ZENTNER CO., co-partners, d/b/a RAI-
NIER DISTRIBUTING CO., and A. LEVY
and J. ZENTNER CO., d/b/a VALLEY BEV-
ERAGE COMPANY, as successor to RAINIER
DISTRIBUTING CO.,

and

INTERNATIONAL UNION OF UNITED
BREWERY, FLOUR, CEREAL AND SOFT
DRINK WORKERS OF AMERICA, LOCAL
227, CIO.

SPECIAL APPEARANCE BY MOTION TO
QUASH SUBPOENA AND PETITION TO
REVOKE SUBPOENA

Now comes Louise Hamilton and appears specially
before the trial Examiner, C. W. Wittemore, of the
National Labor Relations Board, for the purpose of
moving to quash and petitioning to revoke the pur-
ported process described as a subpoena of the Na-
tional Labor Relations Board, No. B 8870, which
appears to have been issued on or before June 23rd,
1948, in the above-entitled matter, and as grounds
for this motion and petition states:

I. That the National Labor Relations Board is

without authority or jurisdiction to act or proceed in this matter for the following reasons:

(a) That the purported complaint in this matter (General Counsel's Exhibit No. (d) is predicated upon so-called "second amended charges" (General Counsel Exhibits No. 1A, 1B, and 1C), dated January 24th, 1948, and charging unfair labor practices allegedly occurring in the months of July and August, 1946.

(b) That there is no contention or evidence in this proceeding of service of these so-called charges upon any of the persons sought to be charged at any time prior to February 12th, 1948.

(c) That these so-called charges show upon their face that they do not contain the matters required by Section 203.12 of the Rules and Regulations of the National Labor Relations Board, Series 5, effective August 27th, 1947, and in effect continuously thereafter, and in particular the matters required by subsections (b), (e) and (f) of Section 203.12.

(d) That the purported complaint is dated April 26th, 1948, and alleges unfair labor practices occurring in the months of July and August, 1946, and is without allegations of the jurisdictional matters required by Sections 9 (f), (g), and (h) and 10 (b) of the Act, to-wit:

- (1) That charges were filed;
- (2) That charges were served;
- (3) That charges were served within six months of the alleged unfair labor practices;
- (4) That if not filed in time the charging party or person aggrieved was prevented from doing so

by the reason of service in the armed forces of the United States.

(b) That the charging union and any national or international union with which it is affiliated has filed the documents, and reports required by Section 9 (h) of the Act and Rule 203.13 of the Board.

(e) That no evidence has been offered or adduced in these proceedings, and the representative of the General Counsel has stated in these proceedings that no evidence will be offered or adduced by him or on his behalf, as to any of the matters and things set forth herein in (d) (1) (2) (3), (4), (5) and (6).

(f) That the Trial Examiner in these proceedings has continuously refused and does now refuse to permit respondents to interrogate witnesses produced by the representative of the General Counsel in these proceedings as to any of the matters or things required by Section 9 (h) of the Act, and by Rules 203.12 (e), (f) and 203.13 upon the ground that questions so directed are incompetent, irrelevant, and immaterial to the issues in this matter.

II. That by acting or proceeding in this matter the National Labor Relations Board is denying respondents due process of law in contravention of the Fifth Amendment to the Constitution of the United States for the following reasons:

(a) That this matter has been initiated and is being prosecuted upon an unidentified document received in evidence over objections of respondents which purports to be a complaint issued by a Regional Director of the National Labor Relations Board without any proof or evidence that the same

was ever issued and without any evidence that the same was issued or that these proceedings are had in conformity with Sections 10 (b) and 9 (f), (g) and (h) of the Act; although the same bears the date of April 26, 1948.

(b) That said purported complaint alleges none of the jurisdictional requisites set forth in I (d), above, and the so-called "second amended charges," dated January 24th, 1948, (General Counsel's Exhibits No. 1A, 1B and 1C) show upon their face that they do not contain the matters required by Section 203-12 of the Rules and Regulations of the National Labor Relations Board, Series 5, effective August 27th, 1947, and in effect continuously thereafter, and in particular the matters required by subsections (b), (e), and (f) of Section 203.12.

(c) That no evidence has been offered or received in this proceeding that the purported complaint was issued or that these proceedings follow compliance with Section 10 (b) of the Act and Section 9 (f), (g) and (h) of the Act.

III. That no complaint has issued herein.

Dated at Sacramento, California, June 23rd, 1948.

Respectfully submitted,

/s/ ANTHONY J. KENNEDY,

/s/ CARL KUCHMAN,

/s/ GILFORD G. ROWLAND,

/s/ RICHARD ERNST,

Counsel for Louise Hamilton.

[Endorsed]: Filed July 29, 1948.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE AND ANSWER TO APPLICATION FOR ORDER

Louise Hamilton, respondent in the above-entitled matter, herewith files her return to order to show cause and her answer to the application for order requiring obedience to subpoena duces tecum and admits, denies and alleges as follows:

I.

Respondent denies the allegations of Paragraph 1 of the application for order and alleges the fact to be that if this Court has jurisdiction it has such by virtue of Section 11 (2) of the National Labor Relations Act, as amended (Public Law 101, 80th Congress, First Session, 29 U.S.C.A., Paragraph 141, et seq.) (Supp. 1947), hereinafter referred to as "the Act." Such jurisdiction is limited to enforcing obedience to only those subpoenas as are duly and regularly issued by the National Labor Relations Board in a matter in which the said Board has jurisdiction. Respondent denies that in the matter herein concerned the said Board has jurisdiction to hear the matter, as is more particularly hereinafter alleged.

II.

Respondent admits the allegations contained in the first and second sentences of Paragraph 3 of the application. As to the allegations of the third and last sentence of said paragraph, respondent admits that A. Levy and J. Zentner Co. did business at the same and other places under the names and

styles alleged, but denies that it did business in said place or at any other place as successor to the Rainier Distributing Co. and denies that it operated any business previously operated by the Rainier Distributing Co.

III.

Respondent denies the allegations of Paragraph 4 of the said application and alleges the fact to be:

(a) that under Section 10 of the Act, the Board is empowered to prevent any person from engaging in certain unfair labor practices affecting commerce, but only in those cases in which the said Act authorizes and empowers the Board to act;

(b) that the said Board does not have jurisdiction to issue a complaint based upon any alleged unfair labor practice occurring more than six months prior to the filing of the charge with the Board and service of a copy thereof upon the person against whom the charge is made, unless the aggrieved party was prevented from filing the charge by reason of service in the armed forces, in which event the six-months' period is computed from the date of discharge;

(c) that the said Board does not have jurisdiction to issue a complaint upon any charge made by a labor organization, unless the officers of both said labor organization and of any national or international labor organization of which it is an affiliate or constituent unit, have filed the affidavits as provided by Section 9(h) of said Act and the said labor organizations have themselves complied with Section 9(f) and (g); and

(d) that said Board does not have jurisdiction

to conduct a hearing on any complaint which it does not have jurisdiction to issue; and

(e) Respondent further alleges that to enforce the subpoena described in the application or to compel the respondent to give any testimony in National Labor Relations Board Case No. 20-C-1570, 1571, 1572 would be in violation of law and in violation of the Fourth and Fifth Amendments to the Constitution of the United States and would deny the respondent her constitutional rights under those amendments and would deny the right of the respondents in the proceeding before the National Labor Relations Board to due process of law.

IV.

Respondent denies the allegations of Paragraph 5 of said application and denies that the document entitled "Complaint" attached to the application and marked Exhibit 2 thereof is a true and correct copy of the alleged complaint issued by said Board, and alleges the true facts to be:

(a) That a labor organization known as Local 227 affiliated with the national labor organization known as the International Union of Brewery, Flour, Cereal and Soft Drink Workers of America, CIO, filed with the said Board documents denominated "Second Amended Charge," dated January 26, 1948, copies of which documents are a part of respondent's Exhibit A attached hereto, and no one of said documents is a charge because it does not comply with the provisions of Section 10(b) of the Act and does not comply with the provisions of Sections 203.12 and 203.13, Series 5, Rules and

Regulations of the National Labor Relations Board; and that said documents alleged that certain acts occurring on or about July 30 to August 5, 1946, were unfair labor practices;

(b) that upon the basis of said documents denominated "Second Amended Charge," a document, dated April 26, 1948, was issued entitled "Complaint" which in words and figures is identical with the last 8 pages of respondent's Exhibit A, which is attached hereto and made a part hereof; and that said document alleged that certain acts occurring on or about July 30 to August 5, 1946, were unfair labor practices;

(c) That on or about April 30, 1948, A. Levy and J. Zentner Co. received by registered mail a copy of a document consisting of nine pages, which was bound together by a metal staple and which in words and figures is identical with Exhibit A attached hereto and made a part hereof;

(d) that thereafter A. Levy and J. Zentner Co. filed its Answer to said document entitled "Complaint"; and that pursuant to notice, a hearing on the said purported complaint was begun on June 14, 1948, at Sacramento, California, before a trial examiner of the National Labor Relations Board; and that on June 23, 1948, the hearing was continued sine die, subject to reopening upon ten days' notice to the parties after final determination of any proceeding in the Federal Courts for the enforcement of the said subpoena.

V.

Respondent denies the allegations of Paragraphs 6, 7 and 8 of the said application and alleges the

true facts to be that the sections of the Act and the Rules and Regulations of the Board referred to therein are correctly set forth respectively in Exhibit No. 1, Part (a) and Exhibit No. 1, Part (b), attached to the said application.

VI.

Respondent denies the allegations of Paragraph 10 of the said application and alleges the true facts to be that on June 23, 1948, a subpoena duces tecum was issued by the Board member named in said Paragraph 10 and directed to respondent, requiring her to appear at the time and place specified in said paragraph 10; and further alleges that said subpoena was issued to compel the attendance of respondent at the purported hearing being conducted before a trial examiner of said Board in a matter of which the said Board had no jurisdiction as herein alleged; and that respondent did specially appear at the said purported hearing and did file her special appearance by motion to quash subpoena and petition to revoke subpoena, a true and correct copy of which is annexed to the application and marked Exhibit No. 4; and that said motion and petition was denied by the trial examiner.

VII.

Respondent denies the allegations of Paragraph 11 of the said application and alleges the true facts to be that the said respondent, upon advice of counsel, refused to be sworn or to testify or to produce the books, records, and documents as called for in the subpoena duces tecum.

VIII.

Respondent denies the allegations of Paragraph 12 of the said application and alleges the true facts to be:

(a) That the evidence, both oral and documentary, sought to be secured from respondent through said subpoena would be material and competent evidence if the Board had jurisdiction to conduct the hearing in the course of which said subpoena was issued and alleges that there is a clear and affirmative lack of jurisdiction of the Board in the said proceeding:

(b) That the said subpoena was issued in the course of the hearing in Case No. 20-C-1570, 1571, 1572 and with respect to the alleged unfair labor practices set forth in respondent's Exhibit A and is with respect to no other hearing or investigation of the said Board.

IX.

Respondent denies the allegations of Paragraph 13 of said application and alleges the true facts to be that counsel for A. Levy and J. Zentner Co. and for respondent acknowledge that respondent Louise Hamilton would be a competent witness who has the ability to produce the evidence described in the subpoena duces tecum if the Board had jurisdiction of the matter upon which it was seeking to conduct a hearing; and alleges that the Board is entirely without jurisdiction of the said matter, as herein alleged.

X.

Respondent denies the allegations of Paragraph 14 and alleges the true facts to be that the said

subpoena was issued by the Board in the course of a formal proceeding under Section 10(b) of the Act upon the formal papers in respondent's Exhibit A, which said proceeding is clearly and affirmatively outside of the jurisdiction of the Board, and that the refusal to comply with such subpoena in no way impedes the performance of any lawful duty of the Board.

As a Further and Separate Defense, respondent alleges:

XI.

The affirmative allegations of Paragraphs I, IV, VI and VII hereof are incorporated herein as if set forth at length.

XII.

Said subpoena was issued by the Board in the course of its formal proceeding—Case No. 20-C-1570, 1571, 1572—under Section 10(b) of the Act upon the formal papers in respondent's Exhibit A and solely to compel the production of evidence at the hearing in said proceeding.

XIII.

Upon the face of the formal documents before the Board in said proceeding—its Case No. 20-C-1570, 1571, 1572—it clearly and affirmatively appears that all action of the Board in that case is wholly outside its jurisdiction and that it has no possible statutory authority to proceed in such case—in the following particulars:

(a) The proceeding in said case is with respect to acts, alleged to be unfair labor practices, that occurred on or about July 30 to August 5, 1946, and on a document purported to be a charge filed

by a labor organization and dated January 26, 1948;

(b) The said proceeding is with respect to acts, alleged to be unfair labor practices, that occurred before September 15, 1946, and with respect to which no charge was served until long after June 23, 1947, although no aggrieved party was prevented from filing any charge with respect to such alleged unfair labor practices by reason of service in the armed forces;

(c) The documents purported to be the charges of unfair labor practices on which said proceeding is based are not "charges" because they do not satisfy the requirements of Section 10 of the Act and Sections 203.12 and 203.13, Series 5, Rules and Regulations of the National Labor Relations Board upon the basis of which the purported complaint assertedly was issued;

(d) The purported complaint contains no allegation that each officer of the charging union, Local 227, International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, CIO, has filed an affidavit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. In fact, affidavits of each such officer were not on file when the said purported complaint was issued;

(e) The purported complaint fails to state when,

if ever, the charges of unfair labor practices were filed by said International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, CIO, Local 227;

(f) The purported complaint fails to allege that any charge of the unfair labor practices upon which said purported complaint is based was, within six months of the occurrence of said alleged unfair labor practice, served upon the person against whom such charge was made, or was served at all. In fact, the "Second Amended Charge," in Case No. 20-C-1572, copy of which is part of the purported complaint, was not served until after February 10, 1948, and no charge of any of the alleged unfair labor practices involved in the purported complaint was served until after July 1, 1947.

XIV.

The record before this court shows without contradiction that all action of the Labor Board in said proceeding—its Case No. 20-C-1570, 1571, 1572—is wholly outside its jurisdiction and that it has no possible statutory authority to proceed in such case—in the following particulars:

(a) The fact of the complete absence of jurisdiction of the Board was seasonably raised by respondents and intervenors at the beginning of the hearing in said proceeding and throughout its continuance;

(b) The particulars set forth in subparagraphs (a) through (f) inclusive of Paragraph XII are incorporated herein as if set forth at length;

(c) Throughout the proceeding the General

Counsel of the Board consistently took the position and maintained that proof would not be submitted, and that proof is not required, that there are on file with the Board the affidavits required, under Section 9(h) of the Act, to give jurisdiction to issue a complaint on the basis of the purported charge filed by said Local 227;

(d) Throughout the said proceeding the General Counsel maintained that the existence or non-existence of such affidavits is a purely administrative fact open only to the General Counsel of the Board and may not be litigated before the Board or otherwise and that such fact may not be inquired into by employers, unions or any other interested person;

(e) There is not on file with the Board an affidavit of each officer of the charging labor organization, Local 227, stating the facts required, under Section 9(h) of the Act, to give jurisdiction to issue a complaint on the basis of any charge filed by said labor organization.

As part of this return of the respondent before this court, there are attached hereto, as respondent's Exhibit B, true and correct copies of excerpts from the official transcript of the proceeding in Case No. 20-C-1570, 1571, 1572.

XV.

Respondent further alleges that to enforce the subpoena described in the application or to compel the respondent to give any testimony in the hearing in National Labor Relations Board Case No. 20-C-1570, 1571, 1572 would be in violation of law and

in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and would deny the respondent her constitutional rights under the amendment, and would deny due process of law to the respondents in said proceeding of the Board.

Dated: San Francisco, August 24, 1948.

/s/ ANTHONY J. KENNEDY,

/s/ GILFORD G. ROWLAND,

/s/ CARL KUCHMAN,

/s/ RICHARD ERNST,

Attorneys for Respondent.

State of California,

City and County of San Francisco—ss.

Richard Ernst, being first duly sworn, deposes and says:

That he is one of the attorneys for the respondent in the above-named proceeding; that he has read the said Return to Order to Show Cause and Answer to Application for Order and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

/s/ RICHARD ERNST.

Subscribed and sworn to before me this 24th day of August, 1948.

[Seal] /s/ EUGENE P. JONES,

Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT A

United States of America Before the National Labor
Relations Board, Twentieth Region

Case No. 20-C-1570, 20-C-1571, 20-C-1572

In the Matter of E. A. SPARKS, d/b/a ACME
BEVERAGE COMPANY, GEORGE F.
GOTHMANN, d/b/a STERLING BRANDS,
ALFRED A. BAROSSO, ANDREW W.
WILLI, JOSEPH W. BOWMAN, WILLIAM
A. HARTFORD, and A. LEVY and J. ZENT-
NER CO., co-partners, d/b/a RAINIER DIS-
TRIBUTING CO., and A. LEVY and J. ZENT-
NER CO., d/b/a VALLEY BEVERAGE COM-
PANY, as successor to RAINIER DISTRIB-
UTING CO.,

and

INTERNATIONAL UNION OF UNITED
BREWERY, FLOUR, CEREAL AND SOFT
DRINK WORKERS OF AMERICA, LOCAL
227, CIO.

ORDER CONSOLIDATING CASES AND
NOTICE OF CONSOLIDATED HEARING

Charges, pursuant to Section 10(a) of the Na-
tional Labor Relations Act, as amended, (June 23,
1947, Public Law 101, 80th Congress; Chapter 120—
First Session) having been filed in the above-enti-
tled cases by International Union of United Brew-
ery, Flour, Cereal and Soft Drink Workers of
America, Local 227, affiliated with the Congress of

Industrial Organizations, and the undersigned having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary costs or delay,

It Is Hereby Ordered, pursuant to Section 203.33 (b) of the National Labor Relations Board Rules and Regulations—Series 5, that these cases be, and they hereby are consolidated.

You Are Hereby Notified that, pursuant to Section 10(b) of the Act, on the 10th day of May, 1948, at Sacramento, California, in the Supervisors' Chambers of the County Court House, 7th and I Streets, 10 a.m., a hearing will be conducted before a Trial Examiner of the National Labor Relations Board upon the allegations set forth in the Complaint attached hereto, at which time and place the parties will have the right to appear in person or otherwise, and give testimony.

In Witness Whereof, the General Counsel of the National Labor Relations Board on behalf of the Board, has caused this Order Consolidating Cases and Notice of Consolidated Hearing to be signed by the Regional Director for the Twentieth Region on this 26th day of April, 1948.

/s/ GERALD A. BROWN,
Regional Director, National Labor Relations Board,
407 Federal Office Building, San Francisco, California.

United States of America Before the National Labor
Relations Board, Twentieth Region.

[Title of Causes Nos. 20-C-1570-71-72.]

COMPLAINT

It having been charged by International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, Local 227, affiliated with the Congress of Industrial Organizations, that E. A. Sparks, d/b/a Acme Beverage Company, herein called Respondent Sparks; George F. Gothmann, d/b/a Sterling Brands, herein called Respondent Gothmann; and Alfred A. Barosso, Andrew W. Willi, Joseph W. Bowman, William A. Hartford, and A. Levy and J. Zentner Co., co-partners, d/b/a Rainier Distributing Co., and A. Levy and J. Zentner Co., d/b/a Valley Beverage Company, as successors to Rainier Distributing Co., herein collectively called the Respondents Rainier, have engaged in and are now engaging in certain unfair labor practices affecting commerce, as set forth in the National Labor Relations Act, as amended, herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twentieth Region, designated by the Board's Rules and Regulations, Series 5, Section 203.15, hereby issues his complaint and alleges as follows:

I.

A. Respondent Sparks is now and at all times hereinafter mentioned has been an individual engaged through his place of business at Sacramento, California, in the distribution of malt beverages, wine and candy.

B. Respondent Gothmann is now and at all times hereinafter mentioned has been an individual engaged through his place of business at Sacramento, California, in the distribution of malt beverages and wine.

C. At all times hereinafter mentioned before December 31, 1946, Alfred A. Barosso, Andrew W. Willi, Joseph W. Bowman, William A. Hartford, and A. Levy and J. Zentner Co., a California corporation, were co-partners, doing business in the name and style of Rainier Distributing Co. They engaged, through their place of business at Sacramento, California, in the distribution of malt beverages and wine. On or about December 31, 1946, A. Levy and J. Zentner Co., purchased the assets of the above-described co-partnership and has since, under the name of Valley Beverage Company, continued, as successor to the said co-partnership, to operate the business formerly engaged in by it.

II.

The respondents named above, in the course and conduct of their business operations, caused and have continuously caused substantial amounts of materials to be purchased, delivered and transported in interstate commerce from and through states of the United States other than the State of California.

III.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, affiliated with the American Federation of Labor,

herein called the Teamsters, is and at all times hereinafter mentioned has been, a labor organization within the meaning of Section 2(5) of the Act.

IV.

The respondents, by their respective officers and agents, while engaged in the operations described above, laid-off the employees named below on or about the dates set opposite their names and thereafter refused to employ them unless or until they affiliated with or obtained clearance from the Teamsters:

By Respondent Sparks

Raphael Andereggen, July 30, 1946.

Archie P. Cope, July 30, 1946.

Albert Kozlosky, July 30, 1946.

Theodore G. Parks, July 30, 1946.

Manuel Machado, July 30, 1946.

Victor Stassi, July 30, 1946.

By Respondent Gothmann

Edgar Main, Jr., August 1, 1946.

Arnold Bird, August 1, 1946.

William Booth, August 1, 1946.

John Gonsalves, August 1, 1946.

Charles W. Follett, August 1, 1946.

Clarence Kulil, August 1, 1946.

Leo Kozlosky, August 1, 1946.

John L. Huston, August 1, 1946.

Lynn Matteson, August 1, 1946.

Angelo D'Agostino, August 1, 1946.

Emmet McCauley, August 1, 1946.

By Respondents Rainier

Alfred Costanzo, August 5, 1946.

W. E. Beagle, August 5, 1946.

Tom J. Enos, August 5, 1946.

Vernon Beagle, August 5, 1946.

Gilbert Kozlosky, August 5, 1946.

Mike Matievich, August 5, 1946.

Oscar Matranga, August 5, 1946.

Ernest Bowles, August 5, 1946.

George P. Wolff, August 5, 1946.

V.

The respondents, by their officers and agents, while engaged in their operations described above, did, from on or about July 28, 1946, until August 26, 1946, inform their employees that they could not continue their employment unless they affiliated with or obtained clearance from the Teamsters.

VI.

By their acts set forth in paragraph IV, above, each of the respondents discriminated and is discriminating in regard to hire or tenure of employment or terms or conditions of employment of its employees named in said paragraph, and encouraged membership in a labor organization and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (3) of the Act.

VII.

By their acts set forth in paragraphs IV and V, above, each of the respondents interfered with,

restrained, and coerced, and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

VIII.

The acts of the respondents set forth in paragraphs IV and V, above, occurring in connection with the operations of the respondents described in paragraphs I and II, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IX.

The aforesaid acts of the respondents set forth in paragraphs IV and V, above, and each of them, constitute unfair labor practices within the meaning of Section 8(a)(1) and (3), and Section 2, (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 26th day of April, 1948, issues his Complaint against E. A. Sparks, d/b/a Acme Beverage Company; George F. Gothmann, d/b/a Sterling Brands; Alfred A. Barosso, Andrew W. Willi, Joseph W. Bowman, William A. Hartford, and A. Levy and J. Zentner Co., co-partners, d/b/a Rainier Distributing Co.; and A. Levy and J. Zentner Co., d/b/a

Valley Beverage Company, as successor to Rainier Distributing Co.; the respondents herein.

/s/ GERALD A. BROWN,
Regional Director, National Labor Relations Board,
Twentieth Region.

NLRB—501

(3-1-46)

United States of America
National Labor Relations Board

SECOND AMENDED CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that E. A. Sparks, d/b/a Acme Beverage Company at Sacramento, California, employing 12 workers in Beer Distributing, has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (3) of said Act, in that

1. Said Company, on or about July 30, 1946, discharged from its employ the following persons: R. Andereggen, Archie P. Cope, Albert Kozlosky, Manuel Machado, Theodore G. Parks, and Victor Stassi because of their membership in International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, and their failure and refusal to become and remain members of Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL.

By the acts set forth in the paragraph above and by other Acts and statements, it, by its officers, agents and employees interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the said Act, in violation of Section 8, subdivision (1) of said Act.

The undersigned further charges that said unfair labor practices affecting commerce within the meaning of said Act.

(Full name of labor organization or person filing charge.): International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, CIO, Local 227.

(Address): 601 Polk Street, San Francisco, California. (Telephone): GR. 4-8646.

Do Not Write in this Space—Case No. 20-C-1570.
Docketed 1/26/48.

By /s/ HAROLD H. BONDY,
Int. Rep.

Subscribed and sworn to before me this 26th day of January, 1948, at San Francisco, California, as true to the best of deponent's knowledge, information, and belief.

/s/ NATALIE P. ALLEN,
Board Agent.

(Submit Original and Three Copies of this Charge.)

NLRB 501

(3/1/46)

United States of America
National Labor Relations Board

SECOND AMENDED CHARGE

Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that George F. Gothmann, d/b/a Sterling Brands, at Sacramento, California, employing 14 workers in Beer Distributing, has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (3) of said Act, in that

1. Said Company, on or about August 1, 1946, discharged from its employ the following persons: Edgar Main, Jr., Arnold Bird, William Booth, John Gonsalves, Charles W. Follett, Clarence Kulil, Leo Kozlosky, John L. Huston, Lynn Matteson, Angelo D'Agostino, and Emmet McCauley, because of their membership in International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, and their failure and refusal to become and remain members of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL.

By the acts set forth in the paragraph above and by other acts and statements, it, by its officers, agents and employees interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the said Act, in viola-

tion of Section 8, subdivision (1) of said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

(Full name of labor organization or person filing charge): International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, CIO.

(If labor organization, local name, number and affiliation): Local 227.

(Address): 601 Polk Street, San Francisco, Calif.

(Telephone number): GR. 4-8646.

Do Not Write In This Space. Case No. 20-C-1571.
Docketed 1/26/48.

By /s/ HAROLD H. BONDY,
Int. Rep.

Subscribed and sworn to before me this 26th day of January, 1948, at San Francisco, Calif., as true to the best of deponent's knowledge, information, and belief.

/s/ NATALIE P. ALLEN,
Board Agent.

(Submit original and three copies of this Charge.)

NLRB 501

(3-1-46)

United States of America
National Labor Relations Board

SECOND AMENDED CHARGE

Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that Alfred A. Barosso, Andrew W. Willi, Joseph W. Bowman, William A. Hartford, and A. Levy and J. Zentner Co., co-partners d/b/a Rainier Distributing Co., and A. Levy and J. Zentner Co., d/b/a Valley Beverage Company, as successor to Rainier Distributing Co., at Sacramento, California, employing 9 workers in Beer Distributing, has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (3) of said Act, in that

1. Said Company on or about August 5, 1946, discharged from its employ the following persons: Alfred Costanzo, W. E. Beagle, Vernon Beagle, Tom J. Enos, Gilbert Kozlosky, Mike Matievich, Oscar Matranga, Ernest Bowles, and George P. Wolff, because of their membership in Int'l Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, and their failure and refusal to become and remain members of Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL.

2. By the acts set forth in the paragraph above and by other acts and statements, it, by its offi-

cers, agents and employees, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the said Act, in violation of Section 8, subdivision (1) of said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

(Full name of labor organization or person filing charge): International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, CIO.

(If labor organization, local name, number and affiliation): Local 227.

(Address): 601 Polk Street, San Francisco, Calif.

(Telephone number): GR. 4-8646.

Do Not Write In This Space. Case No. 20-C-1572. Docketed 1/26/48.

By /s/ HAROLD H. BONDY,
Int. Rep.

Subscribed and sworn to before me this 26th day of January, 1948, at San Francisco, Calif., as true to the best of deponent's knowledge, information and belief.

/s/ NATALIE P. ALLEN,
Board Agent.

(Submit Original and Three Copies of This Charge.)

EXHIBIT B

EXCERPTS FROM THE OFFICIAL REPORT
OF THE PROCEEDINGS BEFORE THE
NATIONAL LABOR RELATIONS BOARD
IN CASE No. 20-C-1570, 1571, 1572.

Proceedings of June 14, 1948:

* * *

“Mr. Rowland: On behalf of E. A. Sparks and George F. Gothmann, I will object to the introduction of the documents in evidence on the ground that there has been no proof of service of the charges in the time required by law; further, that there is no showing that the Board has authority to issue the Complaint in the matter, in the absence of such service.” (P. 11)

* * *

“Mr. Kennedy: The same objection to the introduction in evidence is made on behalf of the parties whom I designated here. It appears on the face of the documents filed that no notice was given within six months; there was no filing or service.

“Trial Examiner Whittemore: What was that?

“Mr. Kennedy: It appears on the face of the documents themselves that no notice—that is, no charges were filed nor were any charges served, within six months from the date of the occurrence of the alleged violation.” (P. 12)

* * *

“Mr. McCarthy: * * * the jurisdiction of a body set by Congress must be affirmatively established

and may not be assumed. That applies to the Circuit Courts and all Boards. Consequently, we must go on the record that is offered. The record that is offered to the earliest date is the 26th day of January, 1948.

“So long as the matter is jurisdictional, I think it is up to the Board’s Counsel to establish his right to proceed.” (P. 15)

* * *

“Mr. Ernst: * * * Now as to the other documents prior to ‘q’ through ‘v,’ that is ‘a’ through ‘p,’ we do not believe that they are properly admissible in evidence, on the ground that the Board has no authority, no jurisdiction to proceed with this case, in view of the fact that Section 10(b) prohibits them from issuing the complaint that was issued in this case. Since the General Counsel’s complaint is not permitted by law and the Board has no authority or jurisdiction to entertain or take any action on the basis of a complaint that the General Counsel cannot issue, this entire proceeding is non-existent simply by lack of jurisdiction of the Board to proceed; and for that reason, the Board can take no action.

“Similarly, there is no proof in the proceedings here that the charging party or parties, whichever it may be, have complied with the Communist Affidavit provisions and the information provisions. Until there is proof that that has occurred, there is no showing that the General Counsel had any authority to issue the Complaint. Until there is a showing that the General Counsel had authority to

issue the Complaint, there is no basis for proceeding here and there is no basis for accepting in evidence a document which purports to be a complaint.

“Under those circumstances, it seems clear that the Board has not given the necessary foundation evidence with respect to the documents in order for them to be accepted in evidence. They are merely pieces of paper, and I see no reason why pieces of paper should be accepted in evidence until the foundation to show that they are actually what they purport to be has been shown.

“I am not certain as to whether service of the other documents is clearly taken care of, although it may be.

“Trial Examiner Whittemore: Does General Counsel wish to be heard on these various objections?

“Mr. Law: Well, I am reluctant to even dignify the objections by an extended answer. I think they are without merit on their face. Unless the Trial Examiner wishes whatever assistance he might derive from argument on specific objections, I don't feel that an answer is necessary.

“Is there any particular point made upon which you would like the assistance of argument?

“Trial Examiner Whittemore: I think not. I think counsel who made the objections will agree that if I don't receive these documents in evidence, there will be no support in the record from which he may argue.

“Mr. Ernst: I think, Mr. Examiner, my point is that the General Counsel should lay the founda-

tions before they are accepted into evidence, and when he puts the foundation evidence in then perhaps some, or perhaps even all of them might be shown to be material.

“Trial Examiner Whittemore: Just what are you going to argue on, if we don’t receive them in evidence?”

“Mr. Ernst: Then you won’t have a Complaint issued and you can’t issue an Order.

“Trial Examiner Whittemore: I will overrule the objection.” (Pp. 28-30)

* * *

“Trial Examiner Whittemore: * * *

“It is my understanding, then, simply to sum matters up, that the Respondents and the prospective Intervener are contending that 10(b) of the Act specifically makes it mandatory that not only should there have been a filing of the charge within the six months period after the occurrence of the alleged unfair labor practices, but that each of the Respondents must have been served with copies of those charges.

“Mr. Ernst: That is correct.

“Trial Examiner Whittemore: Is that, in substance, your position?”

“Mr. Ernst: Yes.

“Mr. Kuchman: Precisely.

“Trial Examiner Whittemore: As I understand it, General Counsel’s position is that since the unfair labor practices and the original charges occurred before the passage of the Act, that Section

10(b) does not apply. Is that, in essence, General Counsel's position?

"Mr. Magor: That is our contention.

"Mr. Law: We think that it might apply had there been no charges at all filed within six months of the alleged occurrences, but that is not the situation we are confronted with.

"Trial Examiner Whittemore: Then you claim that charges were filed within the six months period?

"Mr. Law: Yes.

"Trial Examiner Whittemore: Regardless of whether it was before the Act was passed or not?

"Mr. Law: Yes.

"Trial Examiner Whittemore: Your claim is that under any circumstances charges were filed within the six months period?

"Mr. Law: Yes.

"Trial Examiner Whittemore: Do you also claim that service was made? I think that gets back to the point where you were sure you were informed of them but you were not positive of service.

"Mr. Law: We can and will show that they were served prior to the expiration of the six months period established by the amendments to the Act.

"Trial Examiner Whittemore: Well, then on that point you would bring into play your contention that even though they were filed within the six months period, it wasn't essential under the terms of the Act that they were filed within the six months period or served within the six months period, as I understand it, your contention would

be that as long as they were served within six months after the effective date of the Act, they would come then within the provision, is that correct?

“Mr. Law: I think so, yes. We have a hypothetical situation that if no charges had been filed at all within six months of the alleged occurrences, I doubt if the Board would have jurisdiction. But we are simply not confronted with that situation here.

“Trial Examiner Whittemore: It seems to me the one weakness which you concede now is the possible weakness of service.

“Mr. Law: We are not fully prepared to go ahead on that point, as I have said. We will show that there was service within the six months period after the effective date of the new Act. We will, as an alternative position, in order to be sure, if it is necessary, establish that Respondents were also informed of the content of the charges and perhaps were served with the charges at earlier times.”
(Pp. 32-34)

* * *

Proceedings of June 15, 1948

* * *

“Mr. Ernst: Mr. Examiner, before we go into your ruling on the objection, I think there has been no evidence to show that the union involved here has complied with (f), (g), and (h), Section 9, and I wondered if the proper procedure isn't to have that showing, both because of the appearance of Counsel for the union and secondly because the complaint is based upon a charge signed by that union. We

have a running objection, I have said, as to the point.

“Trial Examiner Whittemore: It seems to me that you or somebody has raised this question before and it already has been disposed of.” (P. 223)

* * *

“Q. (By Mr. Rowland): Mr. Main, were you at the time of this trouble an officer of Local 227?

“A. Yes, sir.

“Q. Are you an officer now?

“A. Yes, sir.

“Q. Have you filed the non-communist affidavit?

“Mr. Leonard: Objected to on the ground it is incompetent, irrelevant, and immaterial.

“Trial Examiner Whittemore: I will sustain the objection.

“Mr. Rowland: May I inquire at this point, is it the position of the Examiner that we have no right to inquire as to whether or not the affidavits have been filed and whether the charging union here is qualified under the Act?

“Trial Examiner Whittemore: Very frankly, Mr. Rowland, I am under the impression that it is neither your business nor my business as to whether or not they have done it. Congress specifically stated it was General Counsel's business, and I frankly don't consider that either you nor I are involved. That is General Counsel's responsibility to see to it that that provision of the Act is lived up to before the complaint is issued.

“Mr. McCarthy: And there is no way to test

any error of judgment on the part of the General Counsel? We must be bound by that also?

“Trial Examiner Whittemore: Well, I have not happened to have run into this particular issue before. I don’t know of any—it is an administrative matter.” (Pp. 260-261)

* * *

“Mr. Ernst: Mr. Examiner, could we ask General Counsel if General Counsel’s office will give us the information as to who are the officers of Local 227 and who should have filed affidavits, and if they will give us the information as to when they did? It being our contention that these matters must be disposed of before you can go into the merits of the case.

“Mr. Law: Well, we must, of course, refuse. It is our contention that the compliance of the charging union is not a matter for litigation at this hearing.” (P. 278) * * *

* * *

“Trial Examiner Whittemore: Well, we have been here nearly two days now. I suggest we get down to the actual issues in the case which you are here to meet, the issues which are in the complaint.

“Mr. Ernst: If there is no complaint, Mr. Examiner, there are no issues.

“Mr. Leonard: There is a complaint, introduced in evidence.

“Mr. Ernst: There is no complaint unless jurisdiction is present to issue a complaint; that is about

the first day out in the administration of law. Now, that being the case, I think we are entitled to get an answer from General Counsel and C. I. O. whether they are going to help us; secondly, if they are not, whether the Trial Examiner will ask General Counsel and Counsel for the C. I. O. to give us any information on that. Can't we have simple answers to those questions?

“Mr. Law: You have our answers already.

“Trial Examiner Whittemore: You have answers to the questions from two individuals to whom you have raised them. You have not raised them to the Trial Examiner as yet.

“Mr. Ernst: We hereby request the Trial Examiner to request General Counsel and Counsel for the C. I. O. to procure that information.

“Trial Examiner Whittemore: I regret to inform you I must decline.” (Pp. 279-280)

Proceedings of June 22, 1948

* * *

“Q. (By Mr. Kuchman): From whom would you receive the charges which you docketed?

“A. From the Regional Director.

“Q. Who would that be?

“A. Mr. Brown.

“Q. And how would you determine the docket number?

“A. We keep a record of numbers in a docket book in the office, and you always take the next number.

“Q. And what is the significance of the docket number? Does it represent a file?

“A. Yes, it does.

“Q. And does the file then contain all of the papers pertaining to that proceeding?

“A. Yes, it does.

“Q. Is it indicated in that docket whether or not affidavits had been filed by the charging Union, on behalf of its officers, that they are not members of the Communist Party?

“Mr. Magor: I object to that question on the grounds it is incompetent, irrelevant and immaterial to the issues in this case, wholly apart from the direct examination.

“Trial Examiner Whittemore: I will sustain the objection.

“Mr. Ernst: Well, Mr. Examiner, they brought the person in here to testify and apparently they have written consent from the General Counsel for the witness to testify as to what she does and what are in her records and what are in their files. They have opened it up on direct examination, they have got the written authority to put her on, and I think we are entitled to go into everything that is in the files under her control.

“Mr. Magor: It is a wholly collateral attack.

“Trial Examiner Whittemore: I see no reason to reverse my ruling.” (Pp. 684-685)

(Acknowledgment of Service.)

[Endorsed]: Filed Aug. 25, 1948.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS

Louise Hamilton, through her attorneys, Messrs. Anthony J. Kennedy, Carl Kuchman, Gilford G. Rowland and Richard Ernst, requests the General Counsel of the National Labor Relations Board within ten days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the hearing.

That the following document, exhibited with this request, is genuine.

1. Order Consolidating Cases and Notice of Consolidated Hearing in National Labor Relations Board Case No. 20-C-1570, 1571, 1572, dated April 26, 1948 (with "complaint" attached thereto), copy of which constitutes Exhibit A attached to Respondent's Return to Order to Show Cause and Answer to Application for Order.

That each of the following statements is true:

1. Exhibit A attached to the Respondent's Return to Order to Show Cause and Answer to Application for Order is a true and correct copy of the document of nine pages, which was bound together by a metal staple, forwarded by registered mail on or about April 26, 1948, to certain of the respondents named therein by someone employed in the Twentieth Region office of the National Labor Relations Board.

2. Exhibit B attached to Respondent's Return to Order to Show Cause and Answer to Application for Order contains true and correct excerpts from the official record of the proceedings before the National Labor Relations Board in Case No. 20-C-1570, 1571, 1572.

3. During the period between August 23, 1947, and June 15, 1948—files of the National Labor Relations Board relied on by the General Counsel in issuing the complaint in Case No. 20-C-1570, 1571, 1572 contained no affidavit satisfying Section 9(h) of the Act—to-wit: that the affiant was not a member of the Communist party or affiliated with such party and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods—signed by any person claiming to be an officer or agent or representative of Local 227 of International Union of Brewery, Flour, Cereal and Soft Drink Workers of America, CIO, other than Eugene J. McCann and Harold A. Bondy.

4. Eugene J. McCann who had such affidavit on file gives his position as "General Super and Trustee, State of California," and Harold A. Bondy, who had such affidavit on file, gives his position as "Assistant General Super and Trustee, State of California."

5. Up to June 15, 1948, the Board's files relied on by the General Counsel in issuing the complaint in

Case No. 20-C-1570, 1571, 1572, contained no affidavit purporting to satisfy Section 9(h) of the National Labor Relations Act signed by a President or Secretary of said Local 227 until, if at all, sometime after June 15, 1948.

6. The General Counsel of the National Labor Relations Board makes no contention that any person aggrieved by any one of the unfair labor practices charged or involved in National Labor Relations Board Case No. 20-C-1570, 1571, 1572, was prevented from filing a charge with respect thereto by reason of service in the armed forces.

Dated: August 27, 1948.

/s/ ANTHONY J. KENNEDY,

/s/ CARL KUCHMAN,

/s/ GILFORD G. ROWLAND,

/s/ RICHARD ERNST,

Attorneys for Respondent.

(Acknowledgment of Service.)

[Endorsed]: Filed Aug. 31, 1948.

In the United States District Court for the Northern District of California, Northern Division

No. 6025

NATIONAL LABOR RELATIONS BOARD,
Applicant,

vs.

LOUISE HAMILTON,
Respondent.

MEMORANDUM AND ORDER

An application has been addressed to this court by the National Labor Relations Board, hereinafter called the "Board," for an order requiring obedience to a subpoena duces tecum issued by the Board during its hearing of cases Nos. 20-C-1570, 20-C-1571 and 20-C-1572. Charges alleging unfair labor practices had been filed with the Board by a labor organization January 26, 1948, which practices are alleged to have occurred August 1st and August 5th, 1946. A. Levy and J. Zentner Co., a corporation, were served with the charges on or about February 13th, 1948. General Counsel of the Board issued a complaint April 28th, 1948, which was based on said charges.

A subpoena duces tecum was issued by the Board and on June 23rd, 1947, it was served on respondent herein, Louise Hamilton, a bookkeeper employed by A. Levy and J. Zentner Co., one of the companies so charged. Respondent refused to appear be-

fore the Board and contends that the Board is without jurisdiction for the following reasons: (1) the alleged unfair labor practice occurred more than six months before the charge was filed; (2) there is no showing that non-communist affidavits were filed by the officers of the Union, that copies of the Union's constitution were filed or that the financial reports were made to the Secretary of Labor, all of which are under the terms of the Act and must be complied with before a complaint may be issued. Section 9(f) (g) and (h) of the National Labor Relations Act.

Applicant contends that the requirements under Section 9 (f) (g) and (h) of the Act are in the nature of administrative determination and that the issuance of a complaint is a tacit allegation that the requirements have been met. Respondent argues that such matters are jurisdictional and should be set forth in the complaint in a manner similar to that required of pleadings in the district courts.

Contained in the 1947 amendments to the National Labor Relations Act is the proviso in Section 10 (b) 29 U.S.C.A. 160 (b) "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person with whom such charge is made * * *." (Underlining mine.) The amendments were passed June 23, 1947, and became effective August 23, 1947.

The effect of the provision in Section 10 (b) was

to create for the first time a limitation to the right to issue complaints under the Act. Respondent seeks to restrict the time in which applicant might issue and serve a complaint to the interval between the date of passage and the effective date of the amendment while applicant takes the view that the limitation should be six months from the effective date. If respondent's position prevails the initial proceedings are barred, otherwise they are timely.

Where by statute the time within which the existing right may be exercised is shortened parties affected must be afforded a reasonable time to exercise their remedy. *Rand v. Bossen*, 162 Pac. 2d 457, 27 C. 2d 61.

The issuance of a complaint being a matter of discretion with the General Counsel of the Board it would seem unreasonable to require all possible complaints to be considered and rushed to completion within two months when prior to that time no limitation was imposed. Normally, changes of procedure operate in the future and not retroactively; *National Labor Relations Board v. National Garment Co.*, 166 F. 2d 233, and *National Labor Relations Board v. Brozen*, 166 F. 2d 812. From either viewpoint it follows that the period for filing charges should be determined to be from August 23, 1947, the effective date of the amendment and within the following six months period (or for the six month period following the alleged unfair labor practice, whichever is later).

However, the District Court's interest in granting or denying an order to enforce an administra-

tive subpoena is limited to the questions of whether there is a proceeding pending before the Board over which it has jurisdiction and if the matter sought by the subpoena is relevant to the investigation. *Cudahy Packing Co. v. National Labor Relations Board*, 117 F. 2d 692.

Undoubtedly compliance with the sections of the Act questioned herein would be required for enforcement by the Courts of a final order of the Board, *National Labor Relations Board v. Brozen*, *supra*. The question is not a proper one for determination in the collateral matter relating to the enforcement of subpoena. It is well settled that there must be an exhaustion of administrative remedy before a Court may intervene. Respondent did not appeal as provided under the Rules of the Board and has not properly raised the question of jurisdiction before the Board. Courts will not review an administrative agency's jurisdiction before the agency has reached its final decision on the substantive issue. The agency should be free to formulate its own procedural rules. *Perkins v. Endicott Johnson Corp.*, 128 F. 2d 208, 226.

Administrative pleading and procedure is not held to be as formal and as strict as that of the courts and the Federal Rules of Civil Procedure do not apply. Nevertheless, it would seem that administrative boards, acting in a quasi-judicial capacity, might well require that complaints set forth jurisdictional facts in a fashion similar to that required in the District Courts. This might tend to alleviate the feeling all too common that administrative bod-

ies are a law unto themselves. Congress in amending Section 10 (b), which resulted in the requirement that rules of evidence applicable in District Courts of the United States under the Rules of Civil Procedure be followed so far as practicable has indicated a more formal proceeding by the Board is expected. This is purely suggestive as in a collateral matter, such as this, the Court should not try the main issues in the proceeding pending before the Board. Where there is no final determination by the Board the Court should issue an order enforcing a subpoena if the record shows that the Board may have jurisdiction and that there is a reasonable foundation for the proceeding. The Court should not invade the administrative field when there is a direct administrative procedure to relieve the condition complained of by the aggrieved party and that remedy has not been exhausted.

The records sought to be obtained by the subpoena duces tecum appear relevant in assisting the Board in its determination as to whether or not A. Levy and J. Zentner Co. was doing interstate business.

Petitioner's application for an order requiring obedience to its subpoena duces tecum is granted.

Dated: December 28th, 1948.

/s/ DAL M. LEMMON,

United States District Judge.

Entered in Civil Docket Dec. 28, 1948.

[Endorsed]: Filed Dec. 28, 1948.

[Title of District Court and Cause.]

ORDER REQUIRING OBEDIENCE TO
SUBPOENA DUCES TECUM

This Court having, on December 28, 1948, issued its Memorandum and Order in the above-captioned matter granting the application by the National Labor Relations Board for an order requiring obedience to the subpoena duces tecum served upon the respondent, Louise Hamilton;

It Is Hereby Ordered that the respondent, Louise Hamilton, appear before a Trial Examiner for the National Labor Relations Board at 10:00 o'clock in the forenoon, on the 31st day of January, 1949, in the Supervisors' Chambers of the County Court House, 7th and I Streets, Sacramento, California, and there testify and produce the books, records, correspondence and documents in compliance with the said subpoena duces tecum, and attend before the said Trial Examiner from day to day until her examination shall have been completed.

It Is Further Ordered that service of a copy of this order upon the respondent on or before the 21st day of January, 1949, by registered mail, shall be deemed sufficient service.

/s/ DAL M. LEMMON,
United States District Judge.

Dated: January 17th, 1949.

[Endorsed]: Filed Jan. 17, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT

Notice Is Hereby Given that Louise Hamilton, respondent above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the "Memorandum and Order" made and entered in this action on December 28, 1948, and from the "Order Requiring Obedience to Subpoena Duces Tecum" made and entered on January 17, 1948, and from each of them severally.

Dated: January 26, 1949.

/s/ ANTHONY J. KENNEDY,

/s/ CARL KUCHMAN,

/s/ GILFORD G. ROWLAND,

/s/ RICHARD ERNST,

Attorneys for Appellant
Louise Hamilton.

[Endorsed]: Filed Jan. 27, 1949.

[Title of District Court and Cause.]

ORDER GRANTING SUPERSEDEAS

This cause came on to be heard on motion of the respondent for a stay pending respondent's appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing to the court that defendant is entitled to such a stay,

It Is Ordered that the enforcement of and any

proceedings to enforce the "Memorandum and Order" entered herein on December 28, 1948, or the "Order Requiring Obedience to Subpoena Duces Tecum" entered herein on January 17, 1949, and each of them severally, be stayed pending the determination of respondent's appeal from such orders and each of them, upon the filing by defendant and approval of this court of a bond in the sum of Five Hundred Dollars (\$500.00).

Dated January 27th, 1949.

/s/ DAL M. LEMMON,
District Judge.

(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 27, 1949.

[Title of District Court and Cause.]

DESIGNATION OF RECORD AND STATEMENT OF POINTS

Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Application for Order Requiring Obedience to Subpoena Duces Tecum, filed July 29, 1948, omitting the verification and Exhibit No. 1, Parts a. and b, Exhibit No. 2 (the correct form of which is Exhibit A attached to the return to order to show cause and answer to application for order), and Exhibit No. 3 but including Exhibit No. 4.

2. Return to Order to Show Cause and Answer

to Application for Order (including exhibits attached thereto), filed by Respondent Louise Hamilton on August 25, 1948.

3. Request for Admission of Facts, dated August 27, 1948, and filed August 31, 1948. No denial or objections to said request were filed.

4. Memorandum and Order, dated and filed December 28, 1948.

5. Order Requiring Obedience to Subpoena Duces Tecum, filed January 17, 1949.

6. Notice of Appeal to the Circuit Court of Appeals for the Ninth Circuit, filed January 27, 1949.

7. Order Granting Supersedeas, dated January 28, 1949, and filed January 31, 1949.

8. Statement of Points on which appellant intends to rely.

9. This Designation.

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The court erred in not finding that the National Labor Relations Board has no possible statutory authority to proceed in its hearing based on the purported complaint in its proceeding Cases Nos. 20-C-1570, 1571, 1572, in view of the fact that said purported complaint is based upon a purported charge that was not served upon the person charged until more than 17 months after the occurrence of the alleged unfair labor practice.

2. The court erred in not finding that the Na-

tional Labor Relations Board has no possible statutory authority to proceed in its hearing based on the purported complaint in its proceeding Cases Nos. 20-C-1570, 1571, 1572, in view of the fact that no charge, within the meaning of the law, was filed.

3. The court erred in not finding that the National Labor Relations Board has no possible statutory authority to proceed in its hearing based on the purported complaint in its proceeding Cases Nos. 20-C-1570, 1571, 1572, in view of the fact that at the time of the preparation and mailing of said purported complaint there was not on file with the Board a non-Communist affidavit executed by each officer of the charging labor organization, particularly, the president and the secretary of such organization.

4. The court erred in not finding that the National Labor Relations Board has no possible statutory authority to proceed in its hearing based on the purported complaint in its proceeding Cases Nos. 20-C-1570, 1571, 1572, in view of the fact that said purported complaint contains no allegations of the jurisdictional facts required by Section 9(f), (g), (h) of the National Labor Relations Act.

5. The court erred in not finding that the National Labor Relations Board has no possible statutory authority to proceed in its hearing based on the purported complaint in its proceeding Cases Nos. 20-C-1570, 1571, 1572, in view of the fact that, within the meaning of the law, no complaint issued.

6. The court erred in finding that respondent Louise Hamilton failed to exhaust her administrative remedies.

7. The court erred in finding that respondent Louise Hamilton had not properly raised the question of jurisdiction before the court.

Dated at San Francisco, California, February 16, 1949.

/s/ ANTHONY J. KENNEDY,
/s/ CARL KUCHMAN,
/s/ GILFORD G. ROWLAND,
/s/ RICHARD ERNST,
Attorneys for Louise
Hamilton.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 16, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the defendant.

Application for order requiring obedience to subpoena duces tecum.

Exhibit 4.

Return to order to show cause and answer to application for order.

Request for admission of facts.

Memorandum and order.

Order requiring obedience to subpoena duces tecum.

Notice of appeal.

Order granting supersedeas.

Designation of record and statement of points.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 28th day of February, A.D. 1949.

[Seal]

C. W. CALBREATH,
Clerk.

[Endorsed]: No. 12197. United States Court of Appeals for the Ninth Circuit. Louise Hamilton, Appellant, vs. National Labor Relations Board, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed March 1, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth District.

In the United States Court of Appeals
for the Ninth Circuit

No. 12197

LOUISE HAMILTON,

Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

The points upon which appellant intends to rely are as follows:

1. The District Court erred in not denying enforcement of the subpoena of the National Labor Relations Board on the ground that the Board has no possible jurisdiction or authority to proceed with the hearing, in the Board's proceeding "Cases Nos. 20-C-1570, 1571, 1572," to which the subpoena was ancillary.

2. The District Court erred in not finding that the National Labor Relations Board has no possible jurisdiction or authority to proceed in the said hearing in consequence of the fact that the purported complaint—upon which any jurisdiction or authority depends—is based upon a purported charge that was not served upon the person charged until more than 17 months after the occurrence of the alleged unfair labor practice.

3. The District Court erred in not finding that no charge, within the meaning of the National Labor Relations Act, was filed to commence the said proceeding and in consequence thereof that the Board has no possible jurisdiction or authority to proceed in the said hearing.

4. The District Court erred in not finding that at the time of the preparation and mailing of the said purported complaint there was not on file with the Board a non-Communist affidavit executed by each officer of the charging labor organization, particularly the President and Secretary of such organization, and in consequence thereof that the Board has no possible authority or jurisdiction to proceed in the said hearing.

5. The District Court erred in not finding that the National Labor Relations Board has no possible authority or jurisdiction to proceed in the said hearing in consequence of the fact that the said purported complaint contains no allegations of the jurisdictional facts required by Section 9 (f), (g), (h) of the National Labor Relations Act.

6. The District Court erred in not finding that no complaint issued in the Board proceeding "Cases Nos. 20-C-1570, 1571, 1572," and in consequence that the Board has no possible jurisdiction or authority to proceed in the said hearing in that proceeding.

7. The District Court erred in finding that appellant Louise Hamilton failed to exhaust her administrative remedies.

8. The District Court erred in finding that appellant Louise Hamilton had not properly raised the question of jurisdiction before the National Labor Relations Board.

DESIGNATION OF RECORD

Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Application for Order Requiring Obedience to Subpoena Duces Tecum filed July 29, 1948, omitting the verification and omitting all exhibits except Exhibit No. 4.

2. Return to Order to Show Cause and Answer to Application for Order (including exhibits attached thereto), filed by Appellant Louise Hamilton on August 25, 1948.

3. Request for Admission of Facts, dated August 27, 1948, and filed August 31, 1948. No denial or objections to said request were filed.

4. Memorandum and Order, dated and filed December 28, 1948.

5. Order Requiring Obedience to Subpoena Duces Tecum, filed January 17, 1949.

6. Notice of Appeal to the Circuit Court of Appeals for the Ninth Circuit, filed January 27, 1949.

7. Order Granting Supersedeas, dated January 28, 1949, and filed January 31, 1949.

8. Statement of Points on which appellant intends to rely.

9. This Designation.

Dated: March 8, 1949.

/s/ ANTHONY J. KENNEDY,

/s/ CARL KUCHMAN,

/s/ GILFORD G. ROWLAND,

/s/ RICHARD ERNST,

Attorneys for Louise

Hamilton.

(Acknowledgment of Service.)

[Endorsed]: Filed March 8, 1949. Paul P. O'Brien, Clerk.

